No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

NEW YORK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GOVERNMENT RESPONDENTS IN RESPONSE TO PETITION FOR CERTIORARI BEFORE JUDGMENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the district court correctly concluded, on the basis of well-settled principles of administrative law, that the Secretary of Commerce's decision to add a citizenship question to the decennial census questionnaire was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 3

A. The Decennial Census 3

B. The Decision to Add a Citizenship Question 5

C. Procedural History 11

1. Initial proceedings 11

2. The district court's orders authorizing limited discovery, including Gore's deposition 11

3. The district court's decision on the motion to dismiss 13

4. The district court's order authorizing the Secretary's deposition 13

5. Prior proceedings in this Court 14

6. The trial and the post-trial decision 14

ARGUMENT 17

I. The District Court's Decision Was Correct and Does Not Present Any Novel Question of Law for This Court's Review 17

II. If the Court Concludes That the Importance of This Case Will Eventually Warrant This Court's Review, Then the Court Should Grant Certiorari Before Judgment 33

CONCLUSION 37

TABLE OF AUTHORITIES

Cases **Page(s)**

Attias v. Carefirst, Inc., 865 F.3d 620 (D.C. Cir. 2017) 20

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 28

Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980) 21

Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968 (10th Cir. 2016) 31

City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993) 19

City of Philadelphia v. Klutznick, 503 F. Supp. 663 (E.D. Pa. 1980) 21

Davis v. Federal Election Comm'n, 554 U.S. 724 (2008) 20

Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999) 19,21

Evenwel v. Abbott, 136 S. Ct. 1120 (2016) 3,6

Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980) 3

Franklin v. Massachusetts, 505 U.S. 788 (1992) 22

Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015) 23

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 24,26

New York v. United States Dep't of Commerce, 345 F. Supp. 3d 444 (S.D.N.Y. 2018) 12

Tucker v. United States Department of Commerce, 958 F.2d 1411 (7th Cir. 1992) 23

Cases **Page(s)**

Utah v. Evans, 536 U.S. 452 (2002) 21

Weyerhaeuser Co. v. United States Fish & Wildlife Serv., 139 S. Ct. 361 (2018) 21,22

Wisconsin v. City of New York, 517 U.S. 1 (1996) 21,22

Constitution

U.S. Const.
amend. XIV, § 2 3
art. I, § 2, cl. 3 3

Laws

Pub. L. No. 105-119, 111 Stat. 2440 (1997) 3

2 U.S.C. § 2a 22

5 U.S.C. § 706(2)(A) 30

13 U.S.C.
§ 6 4,16,22,30
§ 141 ..... passim

Administrative

Guidelines for Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Feb. 22, 2002) 22

Statistical Policy Directive No. 1, 79 Fed. Reg. 71,610 (Dec. 2, 2014) 22

Miscellaneous

S. Rep. No. 79-752 (1945) 28

U.S. Census Bureau, 2018 End-To-End Census Test—Peak Operations (Jan. 23, 2018), https://www.reginfo.gov/public/do/DownloadDocument?objectID =80137601 5

INTRODUCTION

The State of New York, seventeen other States, sixteen other governmental entities, and the U.S. Conference of Mayors (respondents) brought this action under the Administrative Procedure Act (APA) to challenge the decision of the Secretary of Commerce to add a question about citizenship status to the decennial census. On January 15, 2019, the United States District Court for the Southern District of New York (Furman, J.) entered final judgment in respondents' favor. After an eight-day trial, the court made detailed and well-supported findings of fact and conclusions of law, holding that the Secretary's decision violated the APA in at least six distinct and independent ways. The court accordingly vacated the Secretary's decision, enjoined petitioners from adding a citizenship question to the 2020 census without curing the legal defects identified in the court's opinion, and remanded the matter to the Secretary. The court also vacated as moot its earlier order authorizing a deposition of the Secretary.

Petitioners now seek certiorari before judgment to the United States Court of Appeals for the Second Circuit, to review the district court's decision. None of the factual or legal questions decided by the district court raises any issue worthy of this Court's review. The court based its rulings on evidence that petitioners concede was properly before the court. The record contains ample support for the court's factual determinations, including those that underlie the holding that respondents had standing to challenge the Secretary's decision. And the court's legal conclusions, including that the Secretary's decision was arbitrary and capricious and contrary to law, correctly apply this Court's

established precedents to the unique circumstances presented here.

Respondents recognize, however, that the resolution of this dispute over the Secretary's decision to add a citizenship question to the decennial census has consequences for the Nation that may lead this Court to conclude that its review is warranted, despite the narrow and well-grounded nature of the factual and legal conclusions presented. If the Court determines that this case will eventually require its review, whether on a writ of certiorari or on a stay application during or after review by the court of appeals, then the Court should grant certiorari before judgment and issue an expedited briefing schedule. As petitioners explain, there is insufficient time for two levels of merits review before June 30, 2019, the date that petitioners represent as the firm deadline for finalizing the census questionnaire for printing. And if this Court is inclined to review the case, it should do so now, rather than on an application for a stay at some later date, when there is no longer time for full briefing and argument.

STATEMENT

A. The Decennial Census

1. The Constitution requires an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration must count all residents, regardless of citizenship status—as petitioners have conceded here (Pet. App. 16a). *See Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). The enumeration affects the apportionment of representatives to Congress among the States, the allocation of electors to the Electoral College, the division of congressional districts within each State, the apportionment of state and local legislative seats, and the distribution of hundreds of billions of dollars of federal funding. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016).

Congress has delegated the task of conducting the decennial enumeration to the Secretary of Commerce and the Census Bureau. Because the enumeration underpins many critical actions taken by federal, state, and local governments, the Secretary must obtain a total-population count that is "as accurate as possible, consistent with the Constitution" and the law. Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997). To ensure that the Secretary pursues an accurate enumeration, Congress has placed several substantive and procedural limits on his authority to conduct the census. For example, the Secretary may use the decennial census to obtain data other than the total-population count only if such data is "necessary." 13 U.S.C. § 141(a). Congress has also required the Secretary to rely on administrative records to collect

data other than the total-population count "[t]o the maximum extent possible," instead of using a question on the census to collect such data. *Id.* § 6(c). Moreover, the Secretary must report to Congress the subjects and questions for the census by set deadlines, and may alter those subjects and questions only if he finds that "new circumstances" necessitate a change and sends a new report to Congress. *Id.* § 141(f).

2. The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household. This questionnaire has not included any question related to citizenship status for more than sixty years. For at least the last forty years, the Bureau has vigorously opposed adding any such question based on its concern that doing so "will inevitably jeopardize the overall accuracy of the population count" by depressing response rates from certain populations, including noncitizens and immigrants. (Pet. App. 28a (quotation marks omitted).)

Although the Bureau has requested citizenship information through other surveys, such requests have gone to many fewer individuals, most recently through a process separate from the decennial enumeration, and thus have not raised similar concerns. Until 2000, the Bureau requested citizenship information through a "long-form" census questionnaire—a list of questions sent each decade to one of every six households. After the 2000 census, the long-form questionnaire was discontinued, and its functions were largely replaced by the American Community Survey (ACS), a yearly survey—conducted apart from the census—that is distributed to about one of every thirty-six households. Because both the ACS and the long-form questionnaire differ in important respects from the decennial census,

testing of a question used for those requests for information "cannot be directly applied to a decennial census environment." U.S. Census Bureau, 2018 End-To-End Census Test—Peak Operations 22-23 (Jan. 23, 2018).

B. The Decision to Add a Citizenship Question

1. In a March 2018 memorandum, the Secretary announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household. (Pet. App. 548a-563a.) This decision contravened the Bureau's long-held opposition to such a question, and disregarded the extensive evidence presented to the Secretary, including the conclusions of the Bureau's Chief Scientist, that adding the question would harm the quality of the census count by reducing the response rate, and would generate less accurate citizenship data than the data available through other means. (Pet. App. 42a-50a.)

In his memorandum, the Secretary represented that he "began a thorough assessment" of whether to add a citizenship question "[f]ollowing receipt" of a December 2017 letter from the Department of Justice (DOJ) requesting citizenship data to help enforce § 2 of the Voting Rights Act (VRA). (Pet. App. 548a-549a.) The Secretary reiterated that narrative in testimony before Congress. (Pet. App. 71a-73a.)

These descriptions of the Secretary's decision-making were misleadingly incomplete, as the Secretary later admitted. In June 2018, after this lawsuit began, the Secretary acknowledged in a supplemental decision memorandum that DOJ's letter had not

initiated his assessment of whether to add a citizenship question. Rather, the Secretary and his staff had engaged in an extensive "deliberative process" about whether to add the citizenship question "[s]oon after [his] appointment as Secretary" in February 2017—almost a year before DOJ's letter. (Pet. App. 546a.) And DOJ had not submitted the December 2017 letter on its own initiative, as the Secretary's March 2018 memorandum implied. Instead, the Secretary and his staff had asked DOJ to "request[] inclusion of a citizenship question." (Pet. App. 546a.)

Even the June 2018 supplemental decision memorandum failed to describe accurately the Secretary's months-long efforts to manufacture a rationale to support his decision to add the citizenship question. Early in the Secretary's tenure, the Secretary spoke with Kris Kobach, then the Kansas Secretary of State, who asked the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of counting noncitizens for congressional apportionment.[1] (AR763-AR764.) The Secretary directed his staff to add a citizenship question. In May 2017, for example, the Secretary asked his staff member Earl Comstock "why nothing [has] been done in response to my months old request that we include the citizenship question." (AR3710.) Comstock replied that Commerce would "get that in place." (AR3710.) These communications did not mention the VRA.

Comstock reached out to officials at both DOJ and the Department of Homeland Security (DHS) to ask

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[1] No such problem exists. The Constitution requires that all inhabitants, including noncitizens, be counted for congressional apportionment. *See Evenwel*, 136 S. Ct. at 1128-29.

whether either agency would request the addition of a citizenship question. Both agencies declined. (Pet. App. 82a-84a.) Comstock continued to work with other Commerce officials to investigate "how Commerce could add the [citizenship] question to the Census itself." (AR12755.)

During August and September 2017, the Secretary repeatedly requested and received updates from his staff regarding the citizenship question. (Pet. App. 84a-89a.) He also again inquired whether DOJ would request the citizenship question, stating that he would "call the AG." (AR12476.) James Uthmeier, Senior Counsel to Commerce's General Counsel, and other Commerce staff provided the Secretary with a written memorandum and multiple briefings on the matter. (Pet. App. 86a-89a.) In communications about materials that were sent to the Secretary, Uthmeier shared his "recommendations on execution" (AR11343-AR11345 (unredacted at PX-607)), suggesting that the Secretary had already decided to add the citizenship question (Pet. App. 120a). He stated that "our hook" was, "[u]ltimately, we do not make decisions on how the [citizenship] data should be used for apportionment, that is for Congress (or possibly the President) to decide." (Pet. App. 87a (quotation marks omitted).)

In late August 2017, Commerce sought again to enlist DOJ to request the citizenship question. In response, then–Attorney General Sessions discussed the issue with John Gore, then Acting Assistant Attorney General for the Civil Rights Division, who became DOJ's point person on the matter. (Pet. App. 89a-90a.) Although DOJ had already declined to request the question, an advisor to Sessions reassured the Secretary's Chief of Staff that DOJ could "do whatever you all need us to do." (AR2651.)

Gore then wrote the December 2017 DOJ letter, which was signed by Arthur Gary, General Counsel of DOJ's Justice Management Division, requesting that Commerce add a citizenship question to the decennial census questionnaire. (Pet. App. 91a-95a.) That letter claimed that the question would allow the Bureau to collect block-level citizenship data that DOJ could use to enforce the VRA's prohibition on diluting the voting power of minority groups. (Pet. App. 564a-569a.) Gary's Division was not responsible for VRA enforcement.

Gore drafted the DOJ letter in response to the Secretary's request that DOJ seek the addition of a citizenship question. In drafting the letter, Gore relied principally on Commerce's work product and advice, rather than the expertise of DOJ staff with VRA-enforcement experience. (Pet. App. 91a-92a.) And Gore drafted the letter without knowing whether a citizenship question would result in citizenship data more accurate than the data already used by DOJ to enforce the VRA, and without discussing that issue with Commerce. (Pet. App. 94a-95a.)

2. Throughout this process, the Secretary and his staff never informed the Census Bureau about the Secretary's decision to add a citizenship question or his extensive efforts to convince DOJ (or another federal agency) to request the question. (Pet. App. 116a-117a.) Unaware of the months of deliberations that had already occurred, the Bureau conducted a "review [of] all possible ways to address" DOJ's request. (AR5491.)

In January 2018, John Abowd, the Bureau's Chief Scientist, and his team of experts provided the Secretary with a memorandum analyzing the effects of adding a citizenship question to the decennial

census questionnaire. (Pet. App. 44a-50a.) The memorandum informed the Secretary that adding a citizenship question would depress the response rate (primarily from households containing one or more noncitizens), require "very costly" Nonresponse Followup (NRFU) procedures, and still "harm[] the quality of the census count" while generating "substantially less accurate citizenship status data" than the data obtainable from administrative records. (AR1277.) The memorandum thus recommended that Commerce use existing administrative records—such as records from the Social Security Administration, Internal Revenue Service, and other federal and state sources—rather than a citizenship question to provide DOJ with the citizenship data that it was requesting. (AR1277.) In February 2018, Abowd met with the Secretary to discuss the Bureau's conclusions. (Pet. App. 50a-51a.)

Around this time, the Bureau's staff invited DOJ's technical experts to meet to discuss the best way to obtain the citizenship data that DOJ had requested. (Pet. App. 95a-99a.) Ron Jarmin, then the Acting Director of the Census Bureau, informed DOJ of the Bureau's conclusion that using administrative records to gather citizenship data would provide "higher quality data produced at lower cost" compared with adding a citizenship question to the census. (AR3289.) Sessions directed DOJ officials not to meet with the Bureau staff. (Pet. App. 96a-97a.) Accordingly, in February 2018, Arthur Gary informed Jarmin that DOJ did "not want to meet." (AR3460.)

In early March 2018, Abowd and his team provided the Secretary with memoranda analyzing the effects of using *both* a citizenship question *and* administrative records to generate citizenship data.

(Pet. App. 51a-58a.) The Bureau strongly recommended against this option based on its analyses and expertise in conducting the census, advising the Secretary that this approach would "have all the negative cost and quality implications" of adding the citizenship question while still "result[ing] in poorer quality citizenship data than" relying on administrative records alone. (AR1312; *see* AR1305.)

3. The Secretary declined to follow the Census Bureau's recommendations. Instead, he issued the March 26, 2018, memorandum announcing his decision to add a citizenship question to the decennial census. (Pet. App. 548a-563a.)

The March 26, 2018, memorandum identified several reasons for the Secretary's decision that were contradicted by the evidence before him. For example, the memorandum asserted that "limited empirical evidence exists about whether adding a citizenship question would decrease response rates" (Pet. App. 557a), even though the Bureau's substantial empirical analyses had shown that adding a citizenship question would significantly decrease response rates and thereby harm the accuracy of the census count. The memorandum also asserted that Commerce could provide the "most complete and accurate" citizenship data to DOJ by using *both* a citizenship question *and* administrative records (Pet. App. 556a), even though the Bureau had provided evidence that this approach would provide *less* complete and *less* accurate citizenship data than using administrative records alone. The Secretary further asserted that the citizenship question was sufficiently "well tested" (Pet. App. 550a), even though the questionnaire including the citizenship question had not undergone any of the

extensive testing required for even a minor alteration to the questionnaire.

C. Procedural History

1. Initial proceedings

In April 2018, respondents filed their complaint, alleging that the Secretary's decision to add a citizenship question was arbitrary and capricious and contrary to law, in violation of the APA, and unconstitutional under the Enumeration Clause.

On June 8, 2018, petitioners purported to file the complete Administrative Record of all materials the Secretary had considered in deciding to add the citizenship question. But petitioners' Administrative Record contained scarcely *any* documents from before DOJ's December 2017 letter, even though the Secretary had been considering the citizenship question long before DOJ's letter. A few weeks later, the Secretary submitted his half-page supplemental decision memorandum, revealing for the first time—in conflict with his initial explanation—that he and his staff had engaged in an extensive "deliberative process" about the citizenship question for nearly a year before DOJ's letter (Pet. App. 546a).

2. The district court's orders authorizing limited discovery, including Gore's deposition

On July 3, the district court ordered petitioners to complete the deficient Administrative Record (Pet. App. 523a-526a) and authorized in addition two categories of limited discovery, subject to strict limitations on both scope and duration (Pet. App. 526a-531a).

First, the court authorized limited expert discovery to assist the parties and the court in understanding the issues. (Pet. App. 530a-531a.) *Second*, the court authorized certain additional discovery based on the irregularity of the record petitioners had produced and "a strong showing" of "bad faith or improper behavior." (Pet. App. 526a (quotation marks omitted).) Specifically, the court found that the Secretary had provided false explanations of his reasons for, and the genesis of, the citizenship question in both his March 2018 decision memorandum and congressional testimony. (Pet. App. 526a-527a.) *See New York v. United States Dep't of Commerce*, 345 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) (explaining July 3 ruling). The Secretary's misleading account was troubling not only for its falsity but also for its strong suggestion that his stated rationale—to help DOJ enforce the VRA—was manufactured to cover a decision that he had already made "before he reached out" to DOJ. (Pet. App. 526a.) The court also noted other evidence that the VRA-enforcement rational was pretextual. (Pet. App. 526a-528a.)

After engaging in discovery for more than two months, petitioners refused to allow respondents to depose Gore. After the district court granted respondents' motion to compel Gore's deposition (Pet. App. 452a-455a), petitioners sought mandamus relief from the Second Circuit to halt then-remaining discovery and quash Gore's deposition. The Second Circuit denied the petition.

3. The district court's decision on the motion to dismiss

Shortly after issuing the July 3 discovery order, the district court denied petitioners' motion to dismiss in part and granted it in part.

Among other rulings, the court concluded that there are sufficient legal standards to review the Secretary's decision to add a citizenship question to the decennial census. (Pet. App. 402a-408a.) For example, the court explained, Congress has placed substantive constraints on the Secretary's discretion to alter the census—including constraints on the Secretary's authority to use the decennial census questionnaire to gather information other than the total-population count for congressional apportionment. (Pet. App. 405a-407a; *see also* Pet. App. 21a-25a.) The court thus allowed respondents' APA claims to proceed. (Pet. App. 434a-435a.) The court dismissed respondents' Enumeration Clause claim for failure to state a claim. (Pet. App. 435a.)

4. The district court's order authorizing the Secretary's deposition

On September 21, 2018, the district court granted respondents' motion to compel the Secretary's deposition, finding that "exceptional circumstances" warranted the deposition. (Pet. App. 437a-439a (quotation marks omitted).) The court found that the Secretary had "unique first-hand knowledge related" to respondents' claims (Pet. App. 439a, 446a (quotation marks omitted)), and that taking the Secretary's deposition was "the only way to fill in critical blanks" in the record (Pet. App. 445a). Petitioners sought mandamus relief from the Second Circuit to overturn

the district court's September 21 order. The Second Circuit denied the petition.

5. Prior proceedings in this Court

Petitioners asked this Court to stay any remaining discovery, including the depositions of the Secretary and Gore, pending their filing of a petition for mandamus or certiorari. This Court stayed only the Secretary's deposition and declined to stay the July 3 order authorizing extra-record discovery or the August 17 order authorizing Gore's deposition. 139 S. Ct. 16, 16-17 (2018). Justice Gorsuch, joined by Justice Thomas, dissented in part, explaining that he would have stayed all three pretrial-discovery orders. *Id.* at 17-18.

Petitioners filed a petition seeking mandamus relief or a writ of certiorari to review the pretrial-discovery orders. *See* Pet., No. 18-557. The Court treated the petition as a petition for certiorari and granted it. The Court subsequently denied petitioners' application to stay the trial. 139 S. Ct. 452 (2018). The parties submitted opening briefs addressing the pretrial-discovery issues.

6. The trial and the post-trial decision

Meanwhile, the district court conducted an eight-day trial. On January 15, 2019, the district court issued an opinion containing detailed findings of fact and conclusions of law. (Pet. App. 1a-354a.) The court also entered final judgment vacating the Secretary's March 2018 decision to add a citizenship question to the 2020 decennial census, enjoining petitioners from adding a citizenship question to the 2020 census unless they cure the legal defects identified in the

court's opinion, and remanding the matter to the Secretary. (Pet. App. 352a.)

First, the court decided what evidence it could properly consider for particular purposes. The court determined that it could consider the Administrative Record for any purpose (*see* Pet. App. 250a) and could consider extra-record evidence to determine respondents' standing (Pet. App. 129a-130a), as both parties had agreed. It would not consider extra-record evidence to resolve whether petitioners had violated the APA by acting contrary to law. It would also not consider extra-record evidence to resolve whether the Secretary's decision was arbitrary and capricious, except to the limited extent that extra-record material illuminated technical matters or showed that the Secretary had failed to consider important factors. (Pet. App. 260a-261a.) And the court determined that, while it *could* properly consider extra-record material to decide whether the Secretary's decision was pretextual, it did not need to do so because it "would reach the same conclusions" based solely on the Administrative Record. (Pet. App. 261a.)

Second, the court determined that the government respondents had standing. (Pet. App. 130a-239a.) The court found that adding a citizenship question would significantly and disproportionally depress the rates at which noncitizens and Hispanics respond to the census questionnaire. (Pet. App. 129a-173a.) Accordingly, the court found, the citizenship question would likely cause a disproportionate undercount of noncitizens and Hispanics and thereby cause government respondents—which have relatively large populations of noncitizens and Hispanics—to lose political representation and federal funding. (Pet. App. 173a-184a, 201a-208a.) The court further found

that adding a citizenship question would harm the accuracy and quality of census data overall, separately injuring respondents that rely on accurate census data to allocate resources. (Pet. App. 184a-187a, 208a-219a.)

Third, based solely on the Administrative Record, the court ruled that the Secretary's decision "violated the APA in multiple independent ways." (Pet. App. 9a.) The decision was arbitrary and capricious because the Secretary had provided explanations that ran counter to the evidence before him, failed to consider important aspects of the problem, and failed to justify extensive departures from required standards and procedures. (Pet. App. 284a-311a.) The decision was contrary to law because it violated two statutes: one requiring the Secretary to acquire citizenship data using administrative records where possible rather than a direct inquiry to all households, 13 U.S.C. § 6; and another precluding the Secretary from altering the topics on the census questionnaire after making a report to Congress unless he first makes and reports certain findings, 13 U.S.C. § 141(f). (Pet. App. 261a-284a.) And the Secretary's decision further violated the APA because it was pretextual—i.e., based on factors other than the VRA-enforcement rationale he had given.[2] (Pet. App. 311a-321a.)

Fourth, the court rejected the private plaintiffs' Fifth Amendment equal protection claim. (Pet. App. 322a.)

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[2] The court noted that extra-record evidence confirmed, but was not essential to, its conclusions that the Secretary's decision was arbitrary and capricious and based on a pretextual rationale. (Pet. App. 313a-315a, 320a-321a.)

Finally, the court vacated as moot its September 21 order authorizing the Secretary's deposition. (Pet. App. 352a-353a.)

After the district court entered final judgment, respondents moved to dismiss as improvidently granted the writ of certiorari related to the pretrial discovery orders. The Court removed that case from its argument calendar and suspended further briefing.

ARGUMENT

I. The District Court's Decision Was Correct and Does Not Present Any Novel Question of Law for This Court's Review.

The district court properly concluded that the Secretary's decision to add a citizenship question to the 2020 decennial census violated the APA in "multiple independent ways." (Pet. App. 9a.) The court reached that decision by applying well-established law to detailed factual findings based largely on the Administrative Record and other evidence submitted during an eight-day trial. The court's factual findings are amply supported. And its legal conclusions are correct, and present no novel or important issue warranting this Court's review.

1. The district court correctly determined that respondents have standing to bring this lawsuit. That determination was based on the court's detailed factual findings and its application of well-settled precedent. (Pet. App. 129a-239a.)

The district court began by issuing careful factual findings based on its review of expert and other testimony submitted during an eight-day trial, its assessment of witnesses' credibility, and the parties'

evidentiary submissions. (*See, e.g.*, Pet. App. 147a-148a & n.37 (crediting portions of experts' testimony).) Based on the testimony of petitioners' expert witness (Dr. Abowd), the Bureau's empirical analyses, and the testimony of multiple other expert witnesses, the district court found that adding a citizenship question to the decennial census questionnaire would significantly and disproportionally decrease the census self-response rates of noncitizen and Hispanic households relative to other groups. (Pet. App. 139a-151a.) While petitioners asserted that the Census Bureau could engage in NRFU operations to mitigate this harm, the court found that NRFU would not cure and might actually exacerbate these differential declines in self-response rates. That finding was supported by multiple sources of evidence, including expert testimony and the history of NRFU operations' inability to cure differential response rates. (Pet. App. 151a-173a.) Moreover, the court found that regardless of whether the citizenship question ultimately causes an undercount, it would make the data collected less accurate overall. (Pet. App. 184a-187a.)

The district court found that these problems would harm respondents in at least four ways (Pet. App. 173a-194a):

- causing substantial risk that some States, including respondents New York and Illinois, would lose congressional representation and that some state subdivisions, including respondents Providence, Rhode Island, and Cameron County, Texas, would lose representation in state legislatures;
- making it almost certain that some States, including respondents New York and New

Jersey, would lose federal funding tied to census-based population counts;

- providing States and their subdivisions, including respondent New York City, with less accurate population data, thus impairing their ability to distribute public resources or perform other "essential government functions"; and
- causing some respondents, including the City of Chicago, to "divert resources in an attempt to mitigate the effects of the citizenship question."

Petitioners do not provide any plausible grounds to challenge the record support for these extensive factual findings.

The district court then applied settled law to the facts in concluding that at least some respondents had standing to bring this suit. (Pet. App. 194a-239a.)

First, the court held that the harms from adding the citizenship question constituted injury in fact under this Court's precedents. The district court based this holding on settled legal principles—for example, that "'expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing'" (Pet. App. 202a (quoting *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 331 (1999))), and that a government entity suffers a concrete injury when it loses federal funds (Pet. App. 204a (citing, e.g., *City of Detroit v. Franklin*, 4 F.3d 1367, 1374-75 (6th Cir. 1993), *cert. denied*, 510 U.S. 1176 (1994))).

Second, the court ruled that these injuries in fact were fairly traceable to the Secretary's decision to add a citizenship question. (Pet. App. 226a-239a.) The

court relied on the extensive trial evidence showing that adding the citizenship question would cause a differential drop in self-response rates, a disproportionate undercount of noncitizen and Hispanic households, and a decline in the overall quality of census data. (Pet. App. 227a.) The court also found that these consequences would harm respondents, many of which have relatively larger populations of noncitizen and Hispanic households. (*See* Pet. App. 173a-184a.) The court also correctly rejected petitioners' arguments against traceability, including the argument that any injury to respondents will be caused solely by the actions of individuals who decline to respond to the census, in violation of a statutory obligation to do so (*see* Pet. 18). The court explained that while "*independent* actions of third parties" might break the causal chain (Pet. App. 233a (quotation marks omitted)), actions that predictably result from "the challenged government conduct" do not do so (Pet. App. 233a (citing *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734-35 (2008))). And here, the disproportionate decrease in response rates caused by the addition of a citizenship question was not only *predictable*, but *actually predicted* by the Census Bureau. (Pet. App. 231a.) Moreover, the statutory duty to respond to the census does not alter the result, the court correctly explained, particularly when petitioners have long understood that changes to the census affect self-response rates notwithstanding the duty to respond. (Pet. App. 236a (citing, e.g., *Attias v. Carefirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018)).)

Third, the court held that the relief respondents seek here—setting aside or enjoining the Secretary's decision and thereby mitigating the injuries that flow

from the decision—would redress respondents' injuries. (Pet. App. 239a.)

2. The district court also properly applied this Court's well-established precedent in concluding that sufficiently administrable legal standards exist to review the propriety of the Secretary's decision to add a citizenship question. (Pet. App. 391a-408a; *see* Pet. App. 20a-25a, 30a-33a.) In doing so, the court relied on the settled and "strong presumption favoring judicial review of administrative action" under the APA, which may be overcome only if the relevant statutes expressly preclude judicial review or are drawn so narrowly that "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quotation marks omitted).

As this Court and others have found, meaningful standards to review the Secretary's decisions about the "form and content" of the census, 13 U.S.C. § 141(a), can be drawn from the Constitution, relevant statutes, and agency practice. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452 (2002) (reviewing decision to use imputation); *House of Representatives*, 525 U.S. 316 (reviewing decision to use statistical sampling); *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (reviewing decision to decline to use statistical adjustment).[3] For instance, the language and structure of the relevant census statutes, as well as the

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[3] *See also, e.g.*, *Carey v. Klutznick*, 637 F.2d 834, 838-39 (2d Cir. 1980) (per curiam) (Secretary's decision about address lists for census reviewable under APA); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 674-77 (E.D. Pa. 1980) (Secretary's

underlying constitutional obligation to enumerate the whole population, require the Secretary "to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census." *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992) (Stevens, J., concurring in part); *see* 13 U.S.C. § 141(a)-(c); 2 U.S.C. § 2a; *Wisconsin*, 517 U.S. at 20 (Secretary's census decisions must bear "reasonable relationship to the accomplishment of an actual enumeration of the population"). Moreover, Congress has further cabined the Secretary's discretion over the census through various other substantive and procedural requirements, including restrictions on the Secretary's use of the decennial census questionnaire to obtain demographic information beyond the total-population count.[4] Finally, many mandatory data-quality and testing requirements limit the Secretary's discretion to make even minor alterations to the decennial census questionnaire—let alone to add a new question. *See* Statistical Policy Directive No. 1, 79 Fed. Reg. 71,610 (Dec. 2, 2014) (Office of Management and Budget); Guidelines for Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Feb. 22, 2002) (OMB); PX-260 (Census Bureau Statistical Quality Standards (July 2013)). These and other standards demonstrate that, although the Secretary has discretion over the form and content of the census questionnaire, that discretion is subject to meaningful limitations that courts can enforce. *See Weyerhaeuser*, 139 S. Ct. at

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decision declining to use statistical adjustment reviewable under APA).

[4] *See e.g.*, 13 U.S.C. § 141(a) (discussed *infra* at 26-27); *id.* § 6(c) (discussed *infra* at 30-31); *id.* § 141(f) (discussed *infra* at 31-32).

371-72; *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652 (2015).

Petitioners miss the mark in attempting to distinguish the Secretary's authority over the content of the census questionnaire from his authority over other aspects of the census, such as whether to use a particular statistical adjustment. The relevant powers of the Secretary in this area derive from the same statute, 13 U.S.C. § 141(a), which authorizes the Secretary to conduct a decennial census of population "in such form and content as he may determine, including the use of sampling procedures and special surveys." Because courts have long reviewed census-related decisions taken under § 141(a), the Secretary's exercise of his § 141(a) authority here to add the citizenship question is likewise reviewable under the APA.[5]

3. The district court further applied settled law to the facts presented and properly determined that the Secretary's decision to add a citizenship question to the census questionnaire was arbitrary and capricious

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[5] Petitioners misplace their reliance (Pet. 19-20) on *Tucker v. United States Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992). There, the parties disagreed over which "statistical methodology" would produce the most accurate population count, and the court declined to overrule the Secretary's judgment. *Id.* at 1418. Here, by contrast, the Secretary added a citizenship question to the decennial questionnaire sent to every residence not in an effort to improve accuracy but rather for a reason unrelated to the total-population count. And unlike a dispute about which statistical method is most accurate, the challenge here focuses on whether the Secretary properly added the citizenship question even though all of the evidence contradicted his justifications.

because it ran counter to the evidence in the Administrative Record, failed to consider important aspects of the problem, and contravened established agency procedures without a rational justification. (Pet. App. 284a-311a.) *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

a. The court correctly concluded that the two basic premises of the Secretary's March 2018 decision memorandum—that adding a citizenship question would not depress self-response rates, and that it would provide the "most complete and accurate" citizenship data for VRA enforcement (Pet. App. 556a)—both ran counter to the evidence presented to him.

First, the court found "simply untrue" (Pet. App. 286a) the Secretary's contention that "no one provided evidence" that adding a citizenship question "would materially decrease response rates" (Pet. App. 557a). As the district court explained and the Administrative Record makes clear, the Secretary received extensive evidence, including empirical analyses from the Census Bureau, that adding a citizenship question would materially and disproportionally decrease census response rates from noncitizen and Hispanic households. (Pet. App. 285a-286a; AR1277-AR1278, AR5500, AR5505-AR5506.) Moreover, as the district court correctly explained, there was no evidence in the Administrative Record that would support the Secretary's contention that response rates would remain unchanged despite the addition of a citizenship question. (Pet. App. 286a.)

Second, the court addressed the Secretary's assertion that a citizenship question is "necessary" to

"provide DOJ with the most complete and accurate" citizenship data for VRA enforcement purposes (Pet. App. 562a, 556a). The court properly found this rationale arbitrary and capricious because "all of the relevant evidence before Secretary Ross—*all* of it—demonstrated that using administrative records" to obtain citizenship data "would actually provide more accurate block-level [citizenship] data than adding a citizenship question to the census." (Pet. App. 290a-291a.) That evidence, again, included detailed analyses from the Census Bureau. (AR1277-AR1278, AR1285, AR1293, AR1312, AR5475.) And petitioners have again failed to identify any evidence supporting the Secretary's contrary contention.

In particular, the Administrative Record directly contradicts the Secretary's assertion, repeated by petitioners here (Pet. 21), that using both administrative records and a citizenship question would produce more accurate and complete citizenship data than using administrative records alone. As the Census Bureau specifically explained to the Secretary, that hybrid option would "have all the negative cost and quality implications" of adding the citizenship question while still "result[ing] in poorer quality citizenship data than" relying solely on administrative records. (AR1312.) Indeed, incomplete or inaccurate responses to the citizenship question would hamper, rather than assist (*see* Pet. 21), the Bureau's ability to impute citizenship data that is missing from administrative records. (Pet. App. 291a; AR1305, AR1307.) Again, nothing in the Administrative Record supports the Secretary's contrary conclusion.

Petitioners simply misconstrue the district court's opinion in contending (Pet. 20-21) that the court substituted its views for that of the Secretary's in

determining that using administrative records alone would produce more accurate citizenship data than adding a citizenship question. The court did no such thing. Instead, it concluded only that the Secretary's stated findings lacked *any* support in the evidence before him. Nor did the court base its decision solely on the fact that the Secretary had overruled the conclusions of his staff. *See* Pet. 21. Rather, as the court explained (Pet. App. 285a), it was the Secretary's disregard of these expert conclusions without *any* record basis for doing so that rendered his decision arbitrary and capricious. The district court thus based its decision on the unremarkable and well-settled principle that an agency decision unsupported by the evidence before the decision-maker is irrational and arbitrary. *See State Farm*, 463 U.S. at 43.

b. The district court also correctly concluded that the Secretary's decision overlooked important aspects of the problem, in violation of the APA. (Pet. App. 294a-300a.)

For example, as the district court found, the Secretary did not consider—let alone issue a rational determination about—whether it is actually "necessary" to obtain block-level citizenship data for VRA enforcement by adding a citizenship question to the census. (Pet. App. 562a.) Instead, the Secretary simply assumed so based on DOJ's December 2017 letter requesting block-level citizenship data purportedly for VRA-enforcement purposes. But even putting aside that this letter was manufactured by Commerce rather than independently generated by DOJ (see *infra* at 28-30), it is the Secretary, not DOJ, who is statutorily responsible for determining whether information other than the total-population count must be obtained from the decennial census questionnaire

rather than from other sources of data. *See* 13 U.S.C. § 141(a). The Secretary thus had an independent obligation to at least consider the extensive evidence in the Administrative Record showing that census-derived block-level citizenship data is not remotely necessary for VRA enforcement, and to give a reasoned explanation for rejecting that evidence. (Pet. App. 294a.)

The Secretary failed to do so. Indeed, his memorandum nowhere addressed the record evidence that DOJ and other litigants have not needed census-derived block-level citizenship data for VRA enforcement during the entire fifty-four-year history of the VRA, and have instead successfully used citizenship data from the ACS or other sources. (AR798-AR800, AR1122-AR1123, AR3605-AR3606.) Nor did the Secretary address the evidence that adding a citizenship question would actually *harm* VRA enforcement by providing less accurate citizenship data than the data available from administrative records, and degrading the accuracy of the enumeration and other data used for VRA enforcement, such as race and age data. (*See* Pet. App. AR799, AR1281-AR1282, AR1311.)

c. As the district court properly found, the arbitrary and capricious nature of the Secretary's decision is further demonstrated by his unexplained departures from established data-quality and testing standards. (Pet. App. 300a-311a.) As just one example, the Bureau requires rigorous pretesting procedures before a question may be added to any survey—let alone an instrument as important as the decennial census questionnaire. Even for far less significant surveys, these procedures can be bypassed only if a waiver is obtained based on "cost or schedule

constraints," or if the question has "performed adequately in another survey." (Pet. App. 303a-304a (quotation marks omitted).) But the Secretary did not conduct any of this required testing, obtain a waiver, or identify adequate performance in another survey before deciding to add the citizenship question to the census questionnaire. (Pet. App. 305a-306a.) To the contrary, the Secretary's decision memorandum admits that the citizenship question does not perform adequately on the ACS, explaining that noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on the ACS (Pet. App. 555a). The Secretary's failure to explain this stark departure from the Bureau's required testing procedures provides an additional reason that his decision was arbitrary and capricious.

4. The district court also correctly concluded that the Secretary's decision to add a citizenship question violated the APA because it was pretextual: the VRA-enforcement rationale he gave for his decision was not the actual rationale on which he based the decision. (Pet. App. 311a-321a.) The court reached this conclusion based on its detailed factual findings and settled law. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-168 (1962) (agency must "disclose the basis for its" action (quotation marks omitted)); S. Rep. No. 79-752, at 15 (1945) (APA legislative history stating that agency must "explain the actual basis and objectives" of its rules). Indeed, petitioners have conceded that agency action based on pretext violates the APA. (Pet. App. 312a.)

Contrary to petitioners' assertion (Pet. 26), ample evidence supported the district court's finding that the Secretary decided to add the citizenship question many months before he issued his March 2018 decision

memorandum for reasons other than the VRA-enforcement rationale he proffered—a finding that the district court made based on "evidence in the Administrative Record alone" (Pet. App. 313a). As established by the portions of the Administrative Record that petitioners initially withheld, the Secretary directed his staff to fulfill his "months old request" to add a citizenship question long before he was aware of any purported VRA-enforcement rationale. (Pet. App. 81a; AR3710.) The Secretary and his staff also went to extraordinary lengths to add the citizenship question without any discussion of VRA enforcement, and worked with DOJ to manufacture DOJ's December 2017 letter to make it appear, misleadingly, as though DOJ had independently initiated a request for citizenship data. (Pet. App. 77a-95a.)

The Administrative Record also demonstrated that DOJ did not genuinely want accurate citizenship data: if it had such a genuine interest, DOJ would not have refused to meet with the Bureau to discuss the Bureau's expert opinion that administrative records would provide DOJ with *more accurate* citizenship data than a citizenship question would provide. (Pet. App. 95a-97a; AR3289, AR8651, AR3460, AR9074.) Petitioners simply ignore this evidence and the court's detailed factual findings in characterizing this case as an innocuous situation where the Secretary was "inclined to favor" a particular outcome, solicited support from other agencies, and took a "hard look" at the issue only after receiving DOJ's December 2017 letter. Pet. 26 (quotation marks omitted). The district court was entitled to find that such a characterization was inconsistent with the evidence before it.

Petitioners also miss the mark in arguing (*id.*) that an agency decision-maker complies with the APA

by withholding information, factors, and rationales on which he based a decision, so long as he subjectively believed the rationale he selectively provided to the public. This contention lacks any grounding in controlling case law or in the APA's foundational purpose of ensuring that courts carefully review agency action to ensure that it is not arbitrary and capricious—as the district court properly reasoned. (Pet. App. 245a-247a, 311a-312a.) In any event, there was no error, much less clear error, in the district court's finding that the Secretary did not believe the VRA-enforcement rationale he proffered. (Pet. App. 320a-321a.)

5. As independent grounds for vacating the Secretary's decision, the district court properly ruled that the decision was "not in accordance with law," 5 U.S.C. § 706(2)(A), because it violated two different provisions of the Census Act. (Pet. App. 261a-284a.)

a. The court correctly determined that the Secretary's decision violated a provision of the Census Act requiring the Secretary to "acquire and use" federal, state, and local records to obtain data, "instead of conducting direct inquiries" to obtain such data, "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. § 6(c). Thus, "if the collection of data through the acquisition and use of administrative records would be as good or better than collection of data through the census, Section 6(c) leaves the Secretary no room to choose; he may not collect the data through a question on the census." (Pet. App. 266a.)

The court properly concluded that the Secretary violated this statutory requirement by refusing to use

administrative records to obtain citizenship data and instead seeking such data via a citizenship question sent directly to every household. As the court found, the Secretary "nowhere mention[ed]" his § 6(c) obligation in his decision memorandum, much less analyzed whether administrative records would provide as good or better citizenship data given the "kind, timeliness, quality and scope" of the citizenship data requested by DOJ. That failure alone warranted vacatur of the Secretary's decision because "[a]gency action taken in ignorance of applicable law is arbitrary and capricious." (Pet. App. 266a (citing, e.g., *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970-71 (10th Cir. 2016) (Gorsuch, J.)).)

Quite aside from his "mere failure to cite a statutory provision" (Pet. 24), the Secretary's refusal to use administrative records also violated the statute. As the district court correctly explained, "every relevant piece of evidence in the Administrative Record supports the conclusion that" relying on a citizenship question and administrative records together—the option that the Secretary chose—"would produce *less accurate citizenship data*" than relying on administrative records alone. (Pet. App. 270a.) And nothing in the Administrative Record supports the Secretary's conclusion that his chosen alternative "would yield more accurate citizenship data" for VRA-enforcement purposes. (Pet. App. 270a.) The district court thus properly concluded that the Secretary's decision was contrary to law based on the plain terms of § 6(c) and the specific Administrative Record here.

b. The district court also did not err in ruling that the Secretary violated a separate provision of the Census Act governing the subjects and topics on the

census. That provision requires the Secretary to submit to Congress a report "of the subjects proposed to be included" on the decennial census at least three years before the census date, and to submit to Congress a report of the "questions proposed to be included" at least two years before the census date. 13 U.S.C. § 141(f)(1)-(2). The Secretary may amend the topics or questions after the relevant report is submitted but before the census date if he "finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in [those] reports... be modified," and submits a new report to Congress. *Id.* § 141(f)(3). Here, the Secretary indisputably did not include citizenship as a subject for the census in his report to Congress under § 141(f)(1), and then modified the census subjects to add citizenship status without making the statutorily required findings or submitting a new report to Congress. He thus violated the plain terms of the statute, as the district court correctly held. (Pet. App. 274a.)

Petitioners are incorrect in arguing (Pet. 25) that the Secretary's violation of § 141(f) is not subject to judicial review on the ground that an official's failure to comply with a congressional-reporting requirement is a matter solely for Congress to address. As the district court observed, the reports that § 141(f) requires are not the type of "freestanding and purely informational" reports that some courts have found unreviewable. (Pet. App. 280a (quotation marks omitted).) Rather, § 141(f) reports have the legal consequence of binding the Secretary to the subjects and questions he specifies unless he makes the requisite findings and submits a new report. (Pet. App. 281a.)

II. If the Court Concludes That the Importance of This Case Will Eventually Warrant This Court's Review, Then the Court Should Grant Certiorari Before Judgment.

Although the district court's fact-bound and well-supported legal conclusions would not ordinarily warrant this Court's review, respondents recognize that the underlying dispute here—the propriety of adding a citizenship question to the decennial census questionnaire—presents a matter of nationwide importance because it affects the accuracy and proper administration of the constitutionally mandated decennial enumeration. As the district court correctly explained, "the interest in an accurate [census] count is immense" because "[e]ven small deviations from an accurate count can have major implications for states, localities, and the people who live in them—indeed, for the country as a whole." (Pet. App. 6a.)

If the Court determines that its review will eventually be required because of the nationwide importance of this dispute, then the Court should grant certiorari before judgment now. There is likely insufficient time for both the Second Circuit and this Court to receive full merits briefing, conduct oral argument, and issue a decision before June 30, 2019, the date that petitioners have represented as the deadline for finalizing the census questionnaire for printing.[6] *See* Pet. 13-14. Thus, absent certiorari before

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[6] Although the Second Circuit has expedited the briefing schedule for petitioners' appeal, the schedule provides for oral argument no earlier than the first week of April 2019. Even if the Second Circuit issues a decision expeditiously, that timeframe still leaves little time for this Court to receive certiorari- and

judgment, this Court will either have to forgo review of this case entirely, or review a subsequent Second Circuit decision solely in the context of an emergency stay application, with extremely abbreviated briefing and little to no time for this Court to consider fully the parties' arguments. *See* Pet. 28 (expedited briefing "would avoid the need for review through emergency stays").

If this Court grants certiorari before judgment, however, it should limit the question presented to a review of the district court's January 15 merits ruling: whether the district court correctly concluded that the Secretary's March 2018 decision to add a citizenship question to the decennial census questionnaire was arbitrary and capricious and contrary to law, in violation of the APA. Petitioners have proposed review of numerous other questions, but they have neither the legal significance ordinarily required for certiorari nor the practical significance that might warrant an extraordinary exercise of this Court's jurisdiction.

Specifically, the ruling that at least some respondents have standing was based on extensive, post-trial findings of fact that are reviewable only for clear error. And the ruling that the Secretary's census-related decisions are reviewable is a straightforward application of numerous prior decisions of this Court in prior challenges to census-related decisions of the Secretary.

The Court should also decline to grant certiorari before judgment to review the district court's pretrial discovery orders. *See* Pet. I. As respondents explained

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merits-stage briefing, conduct oral argument, and issue a decision before the end of June 2019, even on an expedited schedule.

in their still-pending motion to dismiss the prior certiorari petition as improvidently granted, final judgment rendered moot any issue concerning the Secretary's deposition. Joint Mot. to Dismiss (MTD) 8-10, No. 18-557; *see* Br. for Gov't Resp. 26-28, No. 18-557. Final judgment has also rendered moot, or at least unnecessary, this Court's review of the district court's authorization of other extra-record discovery. Far from relying on any extra-record evidence—let alone evidence of the Secretary's "mental processes" (Pet. I)—the district court here expressly ruled that it did not need to rely on *any* extra-record evidence related to the bad-faith finding to conclude that the Secretary had violated the APA (Pet. App. 261a). And certiorari before judgment to review pretrial-discovery rulings would make little sense now that the district court has superseded those rulings with new rulings sharply limiting the use of evidence outside the full Administrative Record.[7] The Court should decline to review orders that have been rendered obsolete and that are tangential to the merits of the case.

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[7] Respondents' motion to dismiss argued that most disputes between the parties about extra-record discovery have been rendered moot or irrelevant by the entry of final judgment, without the Secretary's deposition and without any contested reliance on extra-record material. And respondents argued that "appellate review of *any remaining disputes about extra-record discovery*" should therefore occur on appeal from final judgment rather than on mandamus review of the pretrial rulings. MTD 11 (emphasis added). But the petition for certiorari before judgment does not present any dispute that *remains* after the principal pretrial dispute was rendered moot or irrelevant. In the absence of any such remaining dispute, there is no reason for the Court to determine whether the district court properly authorized extra-record discovery in the first instance. *See id.* at 10-13.

Finally, if the Court grants certiorari before judgment, respondents do not oppose petitioners' request for expedited briefing (Mot. to Expedite, No. 18-966), but request an expedited schedule that is somewhat different from the one proposed by petitioners. Specifically:

If the Court grants the petition, respondents respectfully propose the following schedule for briefing and argument:

March 11, 2019	Petitioners' opening brief
April 10, 2019	Respondents' brief
April 17, 2019	Petitioners' reply brief
April 24, 2019	Oral argument

Alternatively, if the Court determines to calendar the case for argument at a special sitting in May, respondents respectfully propose the following schedule for briefing and argument:

March 22, 2019	Petitioners' opening brief
April 26, 2019	Respondents' brief
May 3, 2019	Petitioners' reply brief
May 10, 2019, or later	Oral argument

CONCLUSION

If the Court concludes that this case warrants its review, even though it represents only the application of settled legal principles to well-supported factual findings, then respondents agree that the expedited schedule permitted by a grant of certiorari before judgment is appropriate.

Respectfully submitted,

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